Navinchandra Chhotelal vs Central Board Of Excise And Customs & Ors on 13 January, 1971

Equivalent citations: 1971 AIR 2280, 1971 SCR (3) 357

Author: C.A. Vaidyialingam

Bench: C.A. Vaidyialingam, J.M. Shelat

PETITIONER:
NAVINCHANDRA CHHOTELAL

Vs.

RESPONDENT:
CENTRAL BOARD OF EXCISE AND CUSTOMS & ORS.

DATE OF JUDGMENT13/01/1971

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
SHELAT, J.M.

CITATION:
1971 AIR 2280 1971 SCR (3) 357

ACT:
Customs Act (32 of 1962), ss. 128 and 129(1) and proviso-Scope of.

HEADNOTE:
The Collector of Customs and Excise confiscated certain smuggled goods. and levied a personal penalty of Rs. 20,0,00 on the appellant under s. 112 of the Customs Act, 1962. He filed an appeal under s. 128 before the first respondent and pleaded that the deposit of penalty as required by s. 129 may be waived. The first respondent, after hearing him on the preliminary point regarding waiver of deposit of penalty ordered that the appeal would be heard on merits if a sum of Rs. 10,000 out of the total penalty was deposited by the appellant; but, since the appellant failed to deposit even the amount of Rs. 10,000 within the prescribed period, the appeal was rejected. The appellant carried the matter in revision to the Government. He was given a further opportunity to deposit the sum of Rs. 10,000 but as he again

failed to do so, the revision petition was rejected. A writ petition to quash the orders of the first respondent and the Government was dismissed by the High Court.
In appeal to this Court,
HELD : (1) Section 129(1) makes it obligatory on the person faling an appeal to deposit the penalty levied pending the disposal of the appeal on merits. The proviso to the section gives power to the Appellate Authority, in appropriate cases, to dispense with such deposit unconditionally or subject to such conditions as it may deem fit. Even though the section, does not expressly provide for the rejection of the appeal for non-compliance with the requirements regarding deposit or with any order that may be passed under the proviso, the Appellate Authority is competent to reject the appeal in those circumstances. Otherwise, the appeal will have to be kept on file and such retention will serve no purpose, because, the Appellate Authority cannot dispose of the appeal on merits when the requirements of s. 129(1) are not complied with. [362 F-G; 364 A-C]
(2) The rejection of the appeal and revision would mean that the appellant was bound by the order of the Collector, but that result was brought about only by the appellant's default. [364 D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 105 of 1967. Appeal by special leave from the order dated August 24, 1966 of the Punjab High Court, Circuit Bench at Delhi in Civil Writ No. 666-D of 1966.

U. M. Trivedi, Swaranjit Sodhi and S. S. Shukla, for the appellant.

L. M. Singhvi and S. P. Nayar, for the respondents.

The Judgment of the Court was delivered by Vaidialingam, J. This appeal, by special leave, against the judgment and order dated August 24, 1966 of the Circuit Bench of the Punjab High Court at New Delhi dismissing in limine Civil Writ No. 666-D of 1966 filed by the appellant to quash the orders of the first and second respondents dated December 7, 1965 and April 23, 1966 respectively. The main question that arises for consideration in this appeal is whether the order of the first respondent, Central Board of Excise and Customs, New Delhi, rejecting the' appeal filed by the appellant for non-compliance with the provisions of s.129 of the Customs Act, 1962 (Act 32 of 1962) (hereinafter to be referred as the Act) was justified. The point lies within a very narrow compass and hence it is not necessary to state elaborately the allegations made against the appellant for taking action under the Act read with the material provisions of the Import and Export Control Act, 1947. The appellant was called upon by the third respondent, Collector of Customs and Excise, Cochin, to show cause why he should not be penalised under s. 112(b) of the Act and why he should not be prosecuted

under s. 135(b) of the Act. Similarly another notice was issued against one Rodrigues, with whom we are not concerned in these proceedings. The appellant made representations against the show cause notice and he was also given an opportunity to contest the allegations made against him. The third respondent by his order dated July 18, 1964 held that the ruby stone in question was smuggled into India by Rodrigues at the instance of the appellant and in pursuance of an agreement entered into between them and that the ruby stone was handed over to Rodrigues by the brother of the appellant at Rangoon. By the said order the third respondent confiscated the ruby stone and levied a personal penalty of Rs. 20,000/- on the appellant under s. 112 of the Act on the ,-round that he was the prime mover behind the smuggling of the ruby stone. A personal penalty was also imposed on Rodrigues who had carried the ruby stone. It was specifically stated in the order that the penalties imposed were without prejudice to institution of any action under s. 135 of the Act.

The appellant filed an appeal on October 7, 1964 before the first respondent under s. 128. After raising his contentions in the memorandum of appeal on merits, he pleaded that it will not be possible for him to deposit the penalty amount of Rs. 20,000/as was necessary under s. 129 of the Act. on the ground that he was innocent and that compliance with the requirement of deposit will result in undue hardship. He further pleaded that it was beyond his means to deposit such a large amount. Accordingly, he requested the first respondent to exempt him from making the deposit of the penalty imposed as a preliminary requirement for hearing the appeal.

(Vaidialingam, j.) The first respondent by his order dated December 7, 1965, rejected the appeal for non-compliance with the provisions of S. 129 of the Act. From the order it is seen that as the appeal had been filed without depositing the penalty levied by the third respondent, the appellant was called upon on November 23, 1964 to deposit the same within 15 days and he was also further informed that his failure to deposit the penalty amount would render his appeal liable to be rejected for non-compliance with the provisions of s. 129. The appeal was heard on this preliminary point regarding waiver of the deposit under the said section. After considering the various grounds that appear to have been pressed on behalf of the appellant, the order of the first respondent proceeds to state that it agreed to consider the appeal on merits- provided a sum of Rs. 10,000/- out of the total penalty levied was deposited. The appellant was informed on August 17, 1965 about this requirement by registered letter and was called upon to deposit the same within 14 days. As the registered letter was returned unserved, a communication was sent to the appellant's lawyer, who was on record and it was acknowledged on October 18, 1965. But as the amount of Rs. 10,000/- was not deposited, the appeal was rejected for non-compliance with the provisions of S. 129 of the Act. The appellant carried the matter in revision before the second respondent under S. 130 of the Act. The appellant was given a further opportunity by the second respondent to deposit the sum of Rs. 10,000/- as required by the first respondent. As the appellant again failed to avail himself of this Opportunity, the second respondent by its order dated April. 23, 1966 rejected the revision petition holding that the matter cannot be considered on merits and that the Government of India saw no reason to interfere with the decision of the Central Board of Excise and Customs. The writ petition filed by the appellant to quash the orders of the first and second respondents was dismissed in limine by the High Court and it is the said order that is challenged before us.

It may be mentioned at this stage that the appellant was prosecuted under s. 135(a) and (b) of the Act, before the District Magistrate, Ernakulam. The District Magistrate by his judgment dated February 28, 1966 found the appellant and Rodrigues not guilty of the offence with which they were charged and acquitted them under s. 258 of the Code of Criminal Produre.

Various grounds of attack against the legality of the demand notice for depositing the penalty under s. 129(1) of the Act have been taken, both before the High Court in the writ petition as also in the petition filed in this Court for special leave. But only two contentions were urged before us by Mr. U. N. Trevedi.

learned counsel for the appellant, namely, (i) section 129 of the Act does not give any power to the first respondent to dismiss the appeal for non-compliance with the requirements regarding the deposit of the penalty amount; and (ii) by rejecting the appeal, the first respondent has approved the order of the third respondent levying penalty against the appellant. It will be noted that the validity of s. 129 of the Act is not challenged.

Dr. L. M. Singhvi, learned counsel for the respondents, on the other hand, urged that the first respondent has acted strictly according to law when it passed the order rejecting the appeal for non-compliance with s. 129. If the appellant, who was given an opportunity not only by the first respondent but also by the second respondent to deposit the half amount of penalty, did not avail himself of the said opportunity, he was entirely to blame for bringing on him the consequences of the rejection of his ,appeal. In view of the contentions taken before us on behalf of the appellant, it is unnecessary for us to consider in great detail the decisions referred to by Mr. Trevedi. In Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and others(1) the question that arose for consi- deration was whether s. 22(1) of the Central Provinces and Berar Sales Tax Act, 1947, requiring the deposit of the penalty along with the appeal applied to an appeal filed against an order ,of assessment on the basis of return filed on date when the original s. 22 (1) was in force. This Court held that it was only s. 22 (1) as it stood on the date of filing of the return that applied and not the amended section.

In Himmatlal Harilal Mehta v. The State of Madhya Pradesh and others(1) the question related to the right of a party to approach the High Court under Art. 226 of the Constitution without availing himself of the other remedies provided under the Central Provinces and Berar Sales Tax Act, 1947. This Court held that by the mere fact that a remedy was available under the said Act, an assessee was not disentitled to relief under Art. 226 when he comes with an allegation that his fundamental right is sought to be infringed.

In Collector of Customs and Excise, Cochin and others V. A. S. Bava (3) the point that arose for consideration was whether s. 129 of the Act governed an appeal filed under the Central Excise and Salt Act, 1944, by virtue of the notification dated (1) [1953]S.C.R.987. (2) [1954] S.C.R. 1122. (3) [1968]1S.C.R.82.

(Vaidialingam, J.) May 4, 1963 issued by the Central Government under S. 12 of the said Act. This Court held that S. 129 of the Act was not attracted.

None of the above decisions have any bearing on the conten- tions raised by Mr. Trevedi.

In order to appreciate the contentions of the learned counsel for the appellant, it is now necessary to refer to ss. 128 and 129 relating to appeals and deposit of penalty or duty pending appeal.

> "128(1) Any person aggrieved by any decision or order passed under this Act may, within three months from the date of the communication to him of such decision or order-
>
> (a) where the decision or order has been passed by a Collector of Customs, appeal to the Board;
>
> (b) where the decision or order has been passed by an officer of customs lower in rank than a Collector of Customs, appeal to the Appellate Collector of Customs;

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(2) The Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and making such further inquiry as may be necessary, pass such order as it thinks fit, confirming, modifying or annulling the decisions or order appealed against :

> Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall not be passed-
>
> (a) by an Appellate Collector of Customs;
>
> (b) by the Board unless the appellant has been given a reasonable opportunity of showing cause against the proposed order;

Provided further that where the Appellate Authority is of opinion that any duty of customs has been short levied, no order enhancing the duty shall be passed unless the appellant is given notice within the time- limit specified in section 128 to show cause against the proposed order.

129(1) Where the decision or order appealed against related to any duty demanded in respect of goods which are not under the control of customs authorities or any penalty levied under this Act. any 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 appellate authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

(2) If upon any such appeal it is decided that the whole or any portion of such duty or penalty was not leviable, the proper officer shall return to the appellant such amount of duty or penalty as was not leviable."

From the provisions extracted above it is to be seen that s. 128 gives a right of appeal against the decision or order passed by the authorities mentioned therein. It also specifies the authorities to whom and the period within which the appeal is to be filed. The proviso to sub-section (1) of s. 128 gives power to the Appellate Authority on sufficient cause being shown to extend the period for filing the appeal by a further period not exceeding three months. Sub-section (2) provides for an opportunity being given to the appellant to be heard, if he so desires, and the Appellate Authorities passing such orders by way of confirming, modifying or annulling the decision or order appealed against, subject to two provisos contained therein. Section 129(1) makes it obligatory on the person filing an appeal to deposit, pending the appeal, with the proper officer the duty demanded or penalty levied where the order or decision appealed against relates to any duty demanded in respect of goods, which are not under the control of Custom Authorities or of penalty levied under the Act. The proviso gives power to the Appellate Authority in particular cases to dispense with such deposit either unconditionally or subject to such conditions, as it may deem fit, when it is of the opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant. Under s. 129 (1) the appellant, in this case, when he filed the appeal to-the first respondent against the order of the Collector of Customs levying penalty had to normally deposit the entire amount of penalty, namely, Rs. 20,000/-, but as the appellant had made a request for dispensing with such deposit, the first respondent heard him on that point and ultimately. as mentioned earlier, reduced the amount of penalty to be deposit-

3 63 (Vaidialingam, J.) ed to Rs. 10,000/-. But as the appellant did not comply with the said requirement, his appeal was rejected without going into merits for non-compliance of S. 129. The second respondent also when it was moved in revision gave the appellant further time to deposit the sum of Rs. 10,000/-, but as the appellant failed to avail himself of that opportunity, the Government of India declined to interfere with the order of the first respondent.

Section 128 no doubt gives a right of appeal. But it is followed by S. 129 (1) regarding making of deposit pending the appeal. It must also be noted that so far as the deposit of duty is concerned, the requirement regarding the deposit will come into force only if the goods in respect of which duty is demanded are not under the control of Customs Authorities. Though subsection (1) of S. 129 may appear to make it necessary that an appellant should deposit the duty or, penalty before his appeal could be heard on merits, the proviso whittles down the rigour of sub-section (1). In this connection it is to be noted that under s. 189 of the Sea Customs Act, 1878, it was obligatory on the part of an appellant to deposit the duty or penalty pending the appeal. There was no provision therein by which the appellate authority could waive the requirement regarding the deposit of the entire amount of duty or penalty. But in the Act by the proviso to subsection (1) of S. 129, which has been quoted above, discretion has been given to the appellate authority to either waive the deposit of the entire amount of penalty or duty or reduce the quantum to be so deposited if the appellate authority is of the opinion that the requirement regarding the deposit of the full amount of penalty or duty will cause undue hardship to an appellant. We have already pointed out that the appellant did make a

request to the first respondent to exempt him from the requirement regarding the deposit of the penalty levied against him. The ,(,rounds pleaded by him in this behalf were he was innocent and that it was not possible for him to deposit the penalty amount. The appellant was heard initially on his request for exempting him from depositing the penalty and having regard to the representations made by him, the first respondent reduced the amount of penalty to be deposited to Rs. 10,000/- that is half the amount of the penalty levied by the Collector. The appellant did not comply with this requirement and therefore his appeal was rejected for non-compliance with the provisions of s. 129 (1). The appellant availed himself of his right to challenge this order in revision under S. 130 of the Act, before the second respondent. The appellant was given a further opportunity to deposit the sum of Rs. 10,000/-, but he failed to avail himself of this further opportunity afforded to him by the second respondent and hence his revision was rejected.

No doubt S. 129 does not expressly provide for the rejection ,of the appeal for non-compliance with the requirement regarding the deposit of penalty or duty, but when sub- section (1) of s. 129 makes it obligatory on an appellant to deposit the duty or penalty _pending the appeal and if a party does not comply either with the main sub-section or with any order that may be passed under the proviso, the appellate authority is fully competent to reject the appeal for non-compliance with the provisions of S. 129(1). That is exactly what the first respondent has done in this case. Accepting the, contention of Mr. Trevedi will mean that the appeal will have to be kept on file for ever even when the requirement of s. 129(1) has not been complied with. Retention of such an .appeal on file will serve no purpose whatsoever because unless section 129(1) is complied with, the appellate authority cannot proceed to hear an appeal on merits. Therefore, the logical consequence of failure to comply with s. 129(1) is the rejection of appeal on that ground.

No doubt, the rejection of the appeal by the first respondent will mean that the appellant is bound by the order of the third respondent levying penalty. Such a result has been brought about ,only by the default of the appellant in complying with the order of the first respondent to deposit half the amount of penalty. Therefore, it follows that the rejection of the appeal by the first respondent was legal and the order of the High Court dismissing the writ petition is valid. In the result the appeal fails and is dismissed with costs.

V.P.S. Appeal dismissed.